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No. 91-30

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IMPERIAL IRRIGATION DISTRICT,
Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD,
Respondent,

ENVIRONMENTAL DEFENSE FUND, INC.,
Intervenor.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

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AMICUS CURIAE BRIEF OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

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55

TABLE OF CONTENTS

	Page
I. Interest	2
II. Summary of Argument	4
III. Argument	5
A. The Petition Misstates the Factual Impact of the Opinion	5
1. Not an Award of Damages	6
2. Metropolitan Funding of Petitioner's Conservation Projects	6
3. Department of the Interior Approval	9
B. The Petition Misstates the Legal Impact of the Opinion	10
1. The Opinion Defers to Federal Authority	10
2. The Opinion is Consistent with the Decisions of this Court	11
a. *Arizona v. California*	11
b. *California v. United States*	14
c. *Bryant v. Yellen*	15
d. *California v. FERC*	15
3. The Opinion is Consistent with Federal Administration	16
IV. Conclusion	18

TABLE OF AUTHORITIES

CASES Page

Arizona v. California, 373 U.S. 546 (1963) 3,11,12,15

Arizona v. California, 376 U.S. 340 (1964) 3

Bryant v. Yellen, 447 U.S. 352 (1980) 15

Califonria v. Federal Energy Regulatory Commission, ___ U.S. ___, 109 L.Ed.2d 474 (1990) .. 15,16

California v. United States, 438 U.S. 645 (1978) .. 14,15

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) 16

Imperial Irrigation District v. State Water Resources Control Board, 225 Cal.App.3d 548 ..... *passim*

Metropolitan Water District v. United States, 628 F.Supp. 1018 (1986) 2

United States v. State Water Resources Control Board, 182 Cal.App.3d 82 (1986) 3

STATUTES

Boulder Canyon Project Act, 42 USC § 617, *et seq.* ..... *passim*

Reclamation Act of 1902, 42 USC § 383 14

California Water Code § 1011 13,14

Deering's California Water Code, Uncodified Act § 9129(b) 2

Metropolitan Water District Act, California Statutes 1969, ch. 209, as amended 2

West's California Water Code, Appendix § 109 2

REGULATIONS

43 CFR Part 417 3,16,17

Metropolitan Water District Administrative Code Section 6430, subdivisions (a) and (b) 1

Table of Authorities Continued

Page

OTHER AUTHORITIES

State Water Resources Control Board Decision 1600 6

Report of Simon H. Rifkind, Special Master, *Arizona v. California*, December 5, 1960 12,13

Wilbur & Ely, the Hoover Dam Documents (1948) 2d Edition, Government Printing Office 2,3,8,10,12

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AMICUS CURIAE BRIEF OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

Counsel[1] for The Metropolitan Water District of Southern California (Metropolitan), a political

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[1] Subsections 6430(a) and (b) of the Metropolitan Water District Administrative Code designate Metropolitan's General Counsel as its authorized law officer.

subdivision[2] of the State of California, submits this brief as *amicus curiae* on behalf of that District and in support of Respondent, State Water Resources Control Board. The purpose of this brief is to call the Court's attention to important misstatements of fact and law in the Petition, of which Metropolitan has special knowledge and which are relevant to the disposition of the Petition.

I.

INTEREST

Metropolitan provides imported water to 27 member public agencies, needed for domestic and municipal uses within a 5,100 square mile service area on the Southern California coastal plain. Fifteen million people, half of California's population, currently live within that semi-arid area which includes portions of six counties and well over 200 major urban and suburban communities.

Metropolitan has a direct interest in the issues raised by the Petition because it has contracts with the Secretary of the Interior (Secretary) under Section 5 of the Boulder Canyon Project Act, 42 USC § 617 *et seq.* (BCPA) for Colorado River water supplies.[3] In 1990 those supplies provided nearly half of

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[2] Metropolitan is a public agency existing pursuant to authority delegated by the California Legislature in the Metropolitan Water District Act (Statutes 1969, ch. 209, as amended; West's Water Code—Appendix § 109; Deering's Water Code—Uncodified Act § 9129b).

[3] *Wilbur & Ely, The Hoover Dam Documents* (1948) 2d Edition, GPO, Appendices 1007, 1008, 1012; *Metropolitan v. U.S.* 628 F.Supp. 1018, 1024 (1986).

Metropolitan's water supply. Metropolitan's contracts are similar to Petitioner's BCPA contract that is the subject of this Petition (Ptn. p. 9).

Both Metropolitan's and Petitioner's contracts contain the same water delivery allocation provisions for California's share of Colorado River water. Both also require reasonable beneficial use of those allocations. (Wilbur & Ely, supra, pp. A508-510, A606-607). Accordingly, Metropolitan is subject to this Court's decree in *Arizona v. California* (376 U.S. 340, 346, 347 (1964))[4] and to the Secretary's regulations (43 CFR Part 417) which the Petition invokes (Ptn. p. 20).

Metropolitan is facing serious water supply shortages because of increasing water demands and significant limitations and uncertainties in its water supplies. Those supplies consist of Metropolitan's Colorado River BCPA contract supply and Northern California water provided under a contract with the State of California for service from California's State Water Project (SWP). SWP supplies are currently under an extensive, multi-year review by Respondent under its statutory duties and pursuant to directions of the California Court of Appeal (*United States v. SWRCB* (1986) 182 Cal.App.3d 82, 97, 98, 120). The State of California has cut SWP water deliveries to Metropolitan this year by 80 percent because of an ongoing five-year drought.

Clearly, Metropolitan has a compelling interest in assuring that California's limited share of the federal

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[4] This Court issued the opinion on which that decree is based in *Arizona v. California* (1963) 373 US 546.

Boulder Canyon Project water supply is used as efficiently as possible. It has therefore undertaken extensive efforts to provide more efficient utilization of existing water supplies wherever possible, including a long-term multi-million dollar water conservation program with Petitioner which substantially facilitates Petitioner's compliance with Respondent's decision that is the subject of this case.

Metropolitan participated in the administrative proceedings which are the subject of the Petition, and submitted a letter to the California Supreme Court supporting Respondent's successful opposition to review by that Court. The Petition also refers to Metropolitan (Ptn. pp. 1, 2, 6, 14, 22, 26, 28).

Metropolitan is, in addition, participating in current proceedings initiated by the Bureau of Reclamation, Department of the Interior, to develop comprehensive federal regulations for administering water entitlements under the BCPA (56 FR 16291, April 22, 1991). Relevant portions of the draft regulations are attached as Items 4 to 8 of the Appendix to this brief, to show the Bureau's recognition of state requirements regarding beneficial and reasonable water uses and water conservation planning.

II.

SUMMARY OF ARGUMENT

The California Court of Appeal opinion in *Imperial Irrigation District v. State Water Resources Control Board*, 225 Cal.App.3d 548 (Opinion) does not raise any significant issue requiring review by this Court. It does not decide a federal question in a way that conflicts with applicable decisions of this Court or an

important question of federal law that has not already been settled by this Court; and does not involve any special and important reason for exercise of judicial discretion. More specifically, the Opinion does not assert any state jurisdiction that conflicts with the Secretary's administration of the Boulder Canyon Project Act.

Unfortunately, the Petition contains serious misstatements of fact and law. It asserts that the Opinion constitutes a multi-million dollar damage award against Petitioner although that is not the case. Metropolitan is, instead, furnishing Petitioner well over $120 million under a water conservation program which the Department of Interior has formally approved. The Petition also mistakenly asserts that the Opinion fails to defer to federal authority and conflicts with the decisions of this Court, although that also is not the case. The Opinion expressly defers to federal administration of the BCPA; and Respondent's water conservation decision which the Opinion affirms does not conflict with the decisions of this Court or with the existing or proposed federal BCPA regulations.

III.

ARGUMENT

A. The Petition Misstates the Factual Impact of the Opinion

The Petition grossly misstates the factual impact of the Opinion by asserting that it approves an order which "amounts to an award of damages against the farmers of IID in favor of the urbanites on California's south coastal plain who depend upon MWD for

water," constituting a windfall to Metropolitan in the "$100 million and more range" (Ptn. p. 14).

1. ***Not an Award of Damages***

Contrary to the Petition's assertions, the Opinion merely reaffirms an administrative determination[5] requiring planning and implementation of measures to prevent waste of large amounts of water (Opn. at 562, 569). There was no dispute that very large quantities of water were being lost (Opn. at 533). Petitioner did not dispute that substantial losses of water resulted from canal spills, excess tailwater and other wasteful practices, such as canal seepage (Opn. at 570). Decision 1600 concluded:

> "Approximately one million acre-feet per year of Colorado River water enter the Salton Sea as irrigation return flow from Imperial Irrigation District. This large quantity of freshwater is lost to further beneficial consumptive use and has contributed to the flooding of property adjoining the Salton Sea." (Decision 1600, p. 66.)

2. ***Metropolitan Funding of Petitioner's Conservation Projects***

Perhaps the most serious aspect of the Petition's factual misrepresentation is its failure to advise this Court that Metropolitan is providing Petitioner well over $120 million to implement water conservation

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[5] Decision 1600, a 71-page review of the history of the administrative proceedings, the evidence taken by Respondent, Respondent's findings and conclusions, and an order requiring Petitioner to take certain actions (Opn. p. 552).

projects[6] and an additional $2.6 million annually for operating, maintenance and replacement costs well into the next century. Indeed, the Opinion states:

> "We also note that an agreement has been negotiated between IID and the Metropolitan Water District which appears to satisfy many of the financial and other problems IID previously asserted as impediments to implementation of Decision 1600." (Opn. p. 557.)

Metropolitan entered into that agreement with Petitioner after four years of extensive negotiations, and required another year to obtain approvals from other BCPA water contractors in California and the Secretary. Implementation of the agreement required the following documentation:

(1) A 1988 Conservation Agreement between Metropolitan and Petitioner;

(2) A 1989 Approval Agreement among Metropolitan, Petitioner, Palo Verde Irrigation District (Palo Verde) and the Coachella Valley Water District (Coachella); and

(3) A 1989 Supplemental Approval Agreement between Metropolitan and Coachella.

All three agreements extend for a minimum of 35 years after full implementation of the conservation

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[6] The Metropolitan funds will also compensate Petitioner for indirect costs and potential obligations resulting from that implementation.

program, currently expected to occur in 1994, and continue until terminated.[7]

In brief, the Conservation Agreement calls for Metropolitan to bear the capital, annual direct and indirect costs of fifteen different conservation projects that Imperial will implement over a five-year period. In 1988 dollars, the capital costs of the conservation program are estimated to total $97,758,000, the indirect costs $23,000,000 and the annual direct costs will increase to $2,635,600 by 1994. In return, Metropolitan will be entitled to increase its diversions from the Colorado River by the amount of water the conservation projects save, approximately 106,110 acre-feet annually upon full implementation of the conservation program except under certain limited conditions.

The Approval Agreement provides the consent of Coachella and Palo Verde[8] to the Conservation Agreement. It addresses the verification of water conserved, circumstances under which Metropolitan has to reduce its use of conserved water, conservation project substitution and augmentation, groundwater storage and recovery, banking of conserved water, and efficiency of water use.

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[7] The documentation contains over 100 pages. We merely summarize it in order to avoid burdening the Court with additional technical material. The documentation package is of course available upon request.

[8] Coachella and Palo Verde also have BCPA Section 5 Water Supply Contracts with the Secretary, Wilbur & Ely, supra, Appendices 1006, 1108. Each of their BCPA contracts contain the same water delivery allocation provisions as do the Section 5 Contracts of Metropolitan and Petitioner, *Id.*, pp. A492-494, A646-648.

The Supplemental Agreement deals with a limitation on Coachella's net Colorado River diversions and the circumstances under which Metropolitan would reduce its use of conserved water.

3. Department of the Interior Approval

The Petition also erroneously asserts that the Opinion conflicts with the Secretary's BCPA authority. (Ptn. pp. 2, 14, 22, 28.) In fact, the Secretary, acting through the Bureau of Reclamation, approved the Conservation Agreement by a January 17, 1989 letter to Metropolitan and Petitioner. In that letter, the Bureau advised that it could adjust its administration of the Boulder Canyon Project accordingly.[9] More specifically, it stated:

> "We have reviewed the [Conservation] Agreement and wish to complement both agencies on your successful efforts to develop a plan which will result in more efficient utilization of the limited water resources of the Colorado River. We are prepared to facilitate the implementation of the Agreement.
>
> . . . .
>
> "If, because of the Agreement, different operational procedures are required to properly administer the deliveries of Colorado River water to the California [BCPA] contractors, we will develop revised operational procedures and provide a draft to you, the other California Colorado River contractors, and the Colorado River Board of California for review."

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[9] A copy of that letter is attached as Item 1 in the Appendix to this brief.

B. The Petition Misstates the Legal Impact of the Opinion

Contrary to the Petition's assertions (Ptn. pp. 2, 6, 7, 14, 19, 28), the Opinion does not conflict with the Secretary's administration of the BCPA. To the contrary, the Opinion expressly defers to federal BCPA jurisdiction and conforms to the decisions of this Court and to the Secretary's regulations.

1. The Opinion Defers to Federal Authority

Far from causing the confrontation or dual system the Petition asserts (Ptn. pp. 2,28), the Opinion specifically recognizes that the BCPA "vested in the Secretary of the Interior the power to enter into contracts for the delivery and allocation of water to users in the southwest United States" (Opn. at 561).

The Opinion also finds that Respondent's Decision 1600 "in no way interfered with" Petitioner's contractual or statutory entitlement to Colorado River water (Opn. at 562). It recognizes that California's share of Colorado River water has been allocated by the California Seven-Party Agreement (Opn. at 561) which the Secretary has incorporated in each of his BCPA Section 5 water delivery contracts with the California BCPA Water Contractors (Wilbur & Ely, pp. 107-109).

Certainly the Opinion does not assert exclusive jurisdiction against the Secretary as the Petition argues (Ptn. p. 6). It merely construes the application of state law to state political subdivisions. It rules that California has validly delegated responsibility to Respondent for supervising the efforts of California's political subdivisions to prevent gross waste of California's limited water supplies. More specifically, it rules that that delegation and Respondent's exercise

of it conform to California's constitutional and other statutory mandates (Opn. at 561 [valid state statutory delegation], at 563 [valid exercise], at 567 [compliance with California's separation of powers doctrine], at 569 [valid state administrative process]).

2. *The Opinion is Consistent with the Decisions of This Court*

The Petition argues that the Opinion conflicts with decisions of this Court (Ptn. pp. 15-19, 23-28). Those decisions, however, recognize that state law may apply to a BCPA contractor's use of its BCPA allocation so long as that does not conflict with the Secretary's contract allocation of Project water supply or the Project's efficient operation and utilization.

a. *Arizona v. California*

The Petition quotes portions of this Court's 1963 decision in *Arizona v. California* 373 US 546, delegating authority to the Secretary to allocate BCPA water supplies and to assure efficient operation and utilization of the project, 373 US at 585-590. That decision, nevertheless, does not purport to prevent state efforts to assure that its BCPA water allocations are used efficiently. It merely requires that those efforts do not interfere with the Secretary's administration of the BCPA.

It expressly recognizes that BCPA Section 18[10] allows the states to do things not inconsistent with the

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[10] Section 18 provides that:

"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control

BCPA or with federal control of the river, 373 US at 588. In short, the decision prevents the states only from imposing restrictions that could frustrate contract allocations of BCPA water supplies or efficient project operation; or thwart full realization of the benefits Congress intended this national project to bestow (373 US at 588-590).

The California Court of Appeal Opinion does not change the Secretary's contract allocation of BCPA water or thwart efficient project operation or full realization of the project benefits Congress intended. Instead, it recognizes Respondent's responsibility to assure that each California BCPA contractor uses its respective BCPA allocation efficiently. And, indeed, each of the BCPA contracts requires that the BCPA water deliveries must be used beneficially and reasonably (Wilbur & Ely, pp. 107-109, pp. A508-511, A605-607.

That reflects the December 1960 final report of this Court's special master in *Arizona v. California* which specifically noted that California water uses would eventually have to be regulated much more efficiently:

> "The supply of available water in the Colorado River has in the past been substantially larger than the demand for it; in short, every project received all the water it requested. In such circumstances it is not surprising that *a great deal of water has been wasted, as is apparent, for example, from the very large unused runoff each*

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and use of water within their borders, except as modified by the Colorado River compact or other interstate agreement." (45 Stat 1065; 43 USC Sec. 617q.)

> *year into the Salton Sea.* Undoubtedly when and if water becomes scarce in this area, its use will be regulated much more efficiently than at present. It appears that *such practices as lining canals, reducing over-ordering of water, re-using runoff water, reducing evaporation, and improving channels can be instituted in the future and will effect a substantial reduction in the amount of water needed to satisfy existing California uses.* It is impossible to determine exactly how much more efficiently water will be used if the present condition of abundance turns into one of shortage, but *it is clear that savings will be such that California's existing uses could be satisfied by substantially less water than is presently diverted.* (Report of Simon H. Rifkind, Special Master, December 5, 1960; p. 103, note 25; emphasis added).

The California Court of Appeal Opinion merely reaffirms, thirty years later, Respondent's authority to require those types of increased water use efficiencies. It does not interfere with the provisions of the BCPA contracts, with this Court's 1964 decree (Ptn. p. 17) or with the operation of the Boulder Canyon Project. Rather than purporting to authorize excessive use of water from the mainstream or otherwise interfering with the Secretary's BCPA operations, it approves Respondent's authority to complement the Secretary's administration of the BCPA.

On the other hand, the Petition's gratuitous reference to California Water Code Section 1011 (Ptn. p. 24, note 26) manifests a disturbing intent to undermine the Secretary's exclusive BCPA contract water allocation authority on an issue which was not

before the California Court of Appeal and which its Opinion does not address. That section[11] approves transfers of conserved water to others if separate transfer authority exists. An attempt by Petitioner to transfer conserved BCPA water other than in accordance with the priorities set forth in the BCPA contracts would clearly conflict with the Secretary's exclusive BCPA water allocation authority.

b. *California v. United States*

The Petition also attempts to limit this Court's decision in *California v. United States* (1978) 438 US 645, (Ptn. pp. 25, 26). That decision recognizes the authority of a state to regulate water rights for federal Reclamation projects so long as the state does not impose conditions that are inconsistent with congressional directives, 438 US at 678. It relies on Section 8 of the Federal Reclamation Act, 43 USC 383, which is similar to Section 18 of the BCPA.

In noting the singular legislative history of the BCPA, that decision reaffirmed the Congressional directive that the states not "interfere with the Secretary's power to determine with whom and on what terms water contracts be made," 438 US at 674. Of

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[11] The relevant portion of Water Code Section 1011 provides:

"(b) Water, or the right to the use of water, the use of which has ceased or been reduced as the result of water conservation efforts as described in Subdivision (a), may be sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer."

special importance here, it also recognized that *Arizona v. California* "plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river," *Id.*, note 29. The California Court of Appeal's Opinion clearly complies with that criterion.

c. *Bryant v. Yellen*

The Petition's reference to *Bryant v. Yellen* (1980) 447 US 352, (Ptn. p. 26) is also misdirected since that decision focused on the present perfected rights aspect of the BCPA. It did not purport to modify *Arizona v. California* or *California v. United States*. In fact, it recognized that, in determining present perfected rights, the BCPA did not displace state law, although determination of whether state water rights qualify as present perfected rights is a question of federal law, 447 US at 370, 371.

d. *California v. FERC*

The Petition also invokes this Court's recent decision in *California v. FERC* (1990) ___ US ___, 109 L.Ed.2d 474. However, that decision did not address the BCPA nor suggest any modification of *Arizona v. California*. It distinguished a state's ability to condition water rights issued for a federal Reclamation Act water project from a state's ability to condition a hydroelectric generating license issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA), 109 L.Ed.2d at 489, 490. The state sought to impose much stricter streamflow limitations on the hydropower project than FERC required, thus reducing the power generating capability which FERC had approved, 109 L.Ed. at 484.

In refusing to disturb its 1946 interpretation of the FPA in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 US 152, this Court reaffirmed the "No Conflict" criterion for State participation and concluded that,

> "The California requirements for minimum instream flows cannot be given effect and allowed to supplement the federal flow requirements. *A state measure is 'preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'* [citations]", 109 L.Ed.2d at 491; emphasis added.

In that case, the responsible federal agency (FERC) had concluded that the state's instream flow requirements interfered with FERC's authority, *Idem.* In the current case, the Secretary has not asserted any conflict with BCPA administration, and the Opinion does not purport to authorize any conflicting action by Respondent. In fact, all indications are that the Secretary considers Respondent's water conservation efforts appropriate.

3. *The Opinion is Consistent with Federal Administration*

The Secretary has approved Metropolitan's Water Conservation Agreement with Petitioner (Appendix, Item 1), which the Opinion notes appears to satisfy many of the requirements of Respondent's Water Conservation Decision and its Order WR 88-20. In addition, Respondent's water conservation Decision, which the Opinion approves, is also consistent with the present federal BCPA regulations (43 CFR Part

417, *Procedural Methods for Implementing Colorado River Water Conservation Measures with Lower Basin Contractors and Others* (Procedural regulations)) and with draft BCPA regulations for administering entitlement to Colorado River water in the Lower Basin (Administrative regulations).[12]

The existing procedural regulations describe the basic conservation criterion as a determination "that deliveries of Colorado River water to each Contractor will not *exceed* those reasonably required for beneficial use" under the respective BCPA contracts (43 CFR § 417.2; emphasis added). The draft administration regulations are more explicit. They expressly provide for state participation in assuring that BCPA water is used beneficially and reasonably, and they are premised on the recognition that,

> "Prudent management is especially critical now that management of the lower Colorado River has

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[12] The Bureau of Reclamation published an advance notice of intent to propose rulemaking, in the Federal Register on April 22, 1991 (56 FR 16291) advising that it is in the process of developing draft regulations for Administering Entitlement to Colorado River Water in the Lower Colorado River Basin. The Bureau subsequently circulated a 54-page package of draft regulations for comment by July 15, subsequently extended to August 15. A copy of the Bureau's transmittal letter, implementation schedule and index to those regulations is included in the Appendix to this brief, along with the following four draft sections that are particularly relevant to the arguments in the pending Petition:

415.6 Beneficial use of entitlements;

.10 Reduction in entitlement due to nonuse;

.17 Water conservation;

.20 Penalties.

> entered an 'era of limits' in which future requests for water are likely to exceed the annual 7.5 million-acre-foot apportionment of water available to the Lower Colorado River Basin under normal conditions." (Appendix Item 2.)

Accordingly, the draft regulations specifically look to the states for assistance "in determining whether or not a user of Colorado River water is applying that water to beneficial use within that respective State and pursuant to the State's laws" (§ 415.6(c)(1); Appendix Item 5); "in making a determination of non-use" (§ 415.10(a); Appendix Item 6); in determining deficiencies in water conservation plans (§ 415.17(f); Appendix Item 7); and in determining reductions in entitlement (§ 415.20(a); Appendix Item 8).

In light of the Secretary's ongoing program to recognize an explicit state water conservation role under the BCPA regulations, there is certainly no need to review the California Court of Appeal Opinion. The normal rulemaking process will provide an efficient and orderly forum for articulating the appropriate technical and institutional process needed to assure that the Boulder Canyon Project will continue to provide the national benefits Congress intended.

IV.

CONCLUSION

The California Court of Appeal Opinion affirming Respondent's water conservation Decision does not conflict with the Boulder Canyon Project Act, any existing or proposed regulation thereunder or the decisions of this Court; and does not present any special and important reason for granting certiorari. The

Metropolitan Water District of Southern California accordingly supports Respondent, State Water Resources Control Board, in urging the Court to deny Imperial Irrigation District's Petition for Certiorari.

Respectfully submitted,

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DATED: July 10, 1991

APPENDIX

APPENDIX

Item	Page
1. Dept. of Interior Letter Approving IID/MWD Water Conservation Agreement (January 17, 1989)	1a
2. Dept. of Interior Letter Transmitting Draft BCPA Administration Regulations	7a
3. Schedule for Implementation of Draft BCPA Regulations	10a
4. Index to Draft Regulations	12a
5. Draft Regulation § 6 (Beneficial Use of Entitlements)	14a
6. Draft Regulation § 10 (Reduction in Entitlements Due to Nonuse)	15a
7. Draft Regulation § 17 (Water Conservation)	18a
8. Draft Regulation § 20 (Penalties)	21a

1.

DEPARTMENT OF INTERIOR LETTER APPROVING IID/MWD WATER CONSERVATION AGREEMENT

(January 17, 1989)

[SEAL] **United States Department of the Interior**

BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY
REFER TO:
LC-440

January 17, 1989

Mr. Charles L. Shreves
General Manager
Imperial Irrigation District
P.O. Box 937
Imperial, CA 92251

Mr. Carl Boronkay
General Manager
the Metropolitan Water
District of Southern
California
P.O. Box 54153
Los Angeles, CA 90054

Subject: Imperial Irrigation District (IID)—The Metropolitan Water District of Southern California (MWD) December 22, 1988, Agreement for the Implementation of a Water Conservation Program and Use of Conserved Water (Agreement) (Water Conservation)

Gentlemen:

The Bureau of Reclamation appreciates receiving a copy of the subject Agreement. We have reviewed the Agreement and wish to compliment both agencies on your successful efforts to develop a plan which will result in more efficient utilization of the limited water resources of the Colorado River. We are prepared to facilitate in the implementation of the Agreement.

We understand that after reviewing the Agreement, both Coachella Valley Water District (Coachella) and the Palo Verde Irrigation District (Palo Verde) have expressed concerns regarding potential impacts on their existing entitlements to water from the Colorado River. We are prepared to operate the river in a manner that will permit us to deliver the water to MWD at its Lake Havasu di-

version point in an amount equivalent to the water conserved under the Agreement, as long as it can be accomplished within the contractual framework under the Seven Party Agreement and California law. We emphasize, however, that, to the extent the agreement has detrimental impacts on the existing rights of Coachella and Palo Verde, such activity would only be carried out with their concurrence. We encourage you to continue your efforts to obtain their concurrence.

If, because the Agreement, different operational procedures are required to properly administer the deliveries of Colorado River water to the California contractors, we will develop revised operational procedures and provide a draft to you, the other California Colorado River contractors, and the Colorado River board of California for review.

Again, we would like to comment you for your efforts to more efficiently use Colorado River water.

Sincerely,

/s/ Edward M. Hallenbeck

Edward M. Hallenbeck
Lower Colorado Regional Director

cc: Mr. Tom Levy
General Manager-Chief Engineer
Coachella Valley Water District
P.O. Box 1058
Coachella CA 92236

Mr. Gerald M. Davisson
Manager
Palo Verde Water District
180 West 14th Avenue
Blythe CA 92225

Mr. Dennis B. Underwood
Executive Director
Colorado River Board of California
107 South Broadway, Room 8103
Los Angeles CA 90012

CATEGORICAL EXCLUSION CHECKLIST

PROJECT: Water Conservation Program, Imperial Irrigation District, Imperial County, California.

NATURE OF ACTION: Agreement for the implementation of a water conservation program and use of conserved water—Imperial Irrigation District and the Metropolitan Water District of Southern California.

EXCLUSION CATEGORY: Approval, renewal, transfer, and execution of an original, amendatory, or supplemental water service or repayment contract where the only results will be to implement an administrative or financial practice or change (516 DM6 Appendix 9.D14).

EVALUATION OF CRITERIA FOR CATEGORICAL EXCLUSION

1. This action or group of actions would have a significant affect on the quality of the human environment.	No _ X _	Uncertain __	Yes __
2. This action or group of actions would involve unresolved conflicts concerning alternative uses of available resources.	No _ X _	Uncertain __	Yes __

EVALUATION OF EXCEPTIONS TO ACTIONS WITHIN CATEGORICAL EXCLUSION

1. This action would have significant adverse effects on public health or safety.	No _ X _	Uncertain __	Yes __

2. This action would affect unique geographical features such as wetlands, wild or scenic rivers, refuges, flood plains, or prime and unique farmlands.	No _ X _	Uncertain __	Yes __
3. This action would have highly controversial environmental effects.	No _ X _	Uncertain __	Yes __
4. The action will have highly uncertain environmental effects or involve unique or unknown environmental risks.	No _ X _	Uncertain __	Yes __
5. This action will set a precedent for future actions.	No _ X _	Uncertain __	Yes __
6. This action is related to other actions with individually insignificant but cumulatively significant effects.	No _ X _	Uncertain __	Yes __
7. This action will affect properties listed or eligible for listing in the National Register of Historic Places.	No _ X _	Uncertain __	Yes __

8. This action will affect a species listed or proposed to be listed as Endangered or Threatened.	No _ X _	Uncertain __	Yes __
9. This action threatens to violate Federal, State, local, or tribal law or requirements imposed for protection of the environment.	No _ X _	Uncertain __	Yes __

NEPA ACTION PROPOSED: Categorical Exclusion _X_
EA ___
EIS ___

EXPLANATION/REMARKS/COMMITMENTS: See enclosures and reference the Environmental Impact Report for the subject action, available from Mr. Mike Walker, Attention: LC-410.

Preparer: /s/ Michael L. Walker
Chief, Fish and Wildlife Branch

Concur: /s/ Robert W. Johnson Date: 1/3/89
Regional Supervisor of Water and Land Operations

Concur: /s/ [Illegible] Date: 1/6/89
Regional Archaeologist

Concur: /s/ Cecil Ouellette Date: 1/6/89
Regional Environmental Officer

Categorical Exclusion No. LC-89-2 Date: 1/6/89

2.

DEPARTMENT OF INTERIOR LETTER TRANSMITTING DRAFT BCPA ADMINISTRATION REGULATIONS

[SEAL] **United States Department of the Interior**

BUREAU OF RECLAMATION
LOWER COLORADO REGIONAL OFFICE
P.O. BOX 427
BOULDER CITY, NEVADA 89005

IN REPLY
REFER TO:
LC-440
WTR-4.10 JUN 04, 1991

To: All Colorado River Contract Water Users

From: Regional Director

Subject: Draft Proposed Regulations for Administering Entitlements to Colorado River Water in the Lower Colorado River Basin (Water Rights)

A copy of the subject draft regulations is enclosed for your information. If adopted, the regulations will implement the criteria by which our office, as the Secretary of the Interior's (Secretary) authorized representative, will fulfill the Secretary's responsibility as watermaster of the lower Colorado River and administer entitlements to the use of its waters. The proposed regulations will enhance the Bureau of Reclamation's (Reclamation) ability to eliminate illegal water diversions by unauthorized users and help ensure that Colorado River water consumptively used in Arizona, California, and Nevada is in fact used by the intended users and is put to beneficial use that does not exceed authorized amounts. Prudent management is especially critical now that management of the lower Colorado River has entered an "era of limits" in which future requests for water are likely to exceed the annual 7.5-million-acre-foot apportionment of water available to the Lower Colorado River Basin under normal conditions.

The proposed regulations are a formal written statement of existing management and operational requirements and

guidelines. Therefore, the regulations do not add new regulatory or environmental obligations. The proposed regulations do, however, propose adding an administrative fee, which would be paid by water users, to offset Reclamation's cost of administering the water entitlements.

Although several iterations of the draft regulations have been circulated within Reclamation and many revisions and refinements have been made, the draft regulations are still being reviewed within Reclamation and are subject to further revision based on that ongoing review. We are not soliciting comments on the regulations from the water users or the general public at this time because this is a preliminary draft. However, contractual water users within the States of Arizona, California, or Nevada may submit comments through the applicable State authority as follows:

Mrs. Elizabeth A. Rieke
Director
Arizona Department of Water Resources
15 South 15th Avenue
Phoenix, AZ 85007

Mr. Gerald R. Zimmerman
Executive Director
Colorado River Board of California
770 Fairmont Avenue
Suite 100
Glendale, CA 91203-1035

Mr. Jack L. Stonehocker
Director
Colorado River Commission of Nevada
State Mail Room Complex
Las Vegas, NV 89158

It is not our intent to encourage comments on the proposed regulations at this time. Water users and other interested parties will have a 60-day period to review and comment on the regulations after they are published as proposed regulations in the *Federal Register*. At present, we estimate the proposed regulations will be published in November 1991. Following publication in the *Federal Register*, we will respond to specific comments and will likely

hold a series of public meetings to accept input from water users, state agencies, and other interested parties. At the close of the public comment period, comments will be evaluated and Reclamation will publish in the *Federal Register* a synopsis of the issues that were raised and Reclamation's responses.

If there are questions on the process of developing the proposed regulations please contact Mr. Dale Ensminger, of this office, Attention: LC-449.

/s/ Robert J. Towles

Enclosure:

cc: Mrs. Elizabeth A. Rieke
Director
Arizona Department of
Water Resources
15 South 15th Avenue
Phoenix, AZ 85007

Mr. Gerald R. Zimmerman
Executive Director
Colorado River Board of
California
770 Fairmont Avenue
Suite 100
Glendale, CA 91203-1035

Mr. Jack L. Stonehocker
Director
Colorado River Commission
of Nevada
State Mail Room Complex
Las Vegas, NV 89158
(w/o cy of encl and w/cy of mailing list to ea)

3.

SCHEDULE FOR IMPLEMENTATION OF DRAFT BCPA REGULATIONS

06/27/91

IMPLEMENTATION OF REGULATIONS FOR ADMINISTERING ENTITLEMENTS TO COLORADO RIVER WATER
LOWER COLORADO RIVER BASIN

SCHEDULE OF EVENTS

Action Item	Date
Outline requirements of regulations.	Completed
Develop draft regulations.	Completed
Draft regulations distributed for in-house review.	Completed
Comments due from all offices within the region.	Completed
Draft regulations sent to Denver, Upper Colorado Regional, and Washington Offices for review.	Completed
Development of public involvement plan due.	Completed
Comments from Regional, projects, and Washington offices.	Completed
Advance Notice of Intent to Propose Rulemaking published in *Federal Register*.	Completed
Comments from Denver and Upper Colorado Regional offices.	Completed
Draft regulations provided to Lower Basin States and Colorado River Indian tribes Coalition for review.	Completed
Comments due from States and Coalition	08/15/91
Draft regulations sent to Denver, Washington, regional divisions and offices, and projects for final review before submittal for publication.	09/30/91
Completion of Determination of Effects. (See note below).	09/30/91
Notice of Intent to Propose Rulemaking published in *Federal Register*.	10/11/91
Comments due from in-house review.	10/21/91

Final draft regulations submitted for *Federal Register* publication.	11/08/91
Publication of draft regulations in the *Federal Register*.	12/13/91
Copy of *Federal Register* notice mailed to Lower Basin States, Indian tribes, water users, and interested parties.	12/23/91
Public hearings.	01/27/92-02/07/92
Comments on proposed regulations due.	02/11/92
Proposed final regulations and responses to public comments to Washington for review.	05/01/92
Comments due from Washington.	06/08/92
Final regulations submitted for publication.	07/13/92
Publication of final regulations in *Federal Register*.	09/01/92
Regulations become effective.	10/01/92

Note:
If the Determination of Effects results in a decision that the proposed rule is "major," or has a significant economic impact on a substantial number of small entities, Reclamation will be required to submit the proposed regulations to the Office of Management and Budget (OMB) for review. OMB will likely take the full 120 days they are allowed for review and the remainder of the schedule will have to slip to permit OMB the review time it needs.

We anticipate that a Categorical Exclusion will provide the appropriate level of compliance with the National Environmental Policy Act for implementation of the regulations; additional slippage of the schedule could occur if more extensive environmental compliance is required.

4.

INDEX TO DRAFT REGULATIONS

Draft Copy
05/20/91

PART 415—REGULATIONS FOR ADMINISTERING ENTITLEMENTS TO COLORADO RIVER WATER IN THE LOWER COLORADO RIVER BASIN

Subpart A—General Provisions

Sec.

415.1 Purpose.

415.2 Applicability.

415.3 Authority.

415.4 Definitions.

Subpart B—Regulations to Establish and Regulate Entitlements to Colorado River Water in the Lower Colorado River Basin

415.5 Determination of composition of Colorado River water.

415.6 Beneficial use of entitlements.

415.7 Written contract or agreement requirements.

415.8 Procedures for obtaining contracts for use of Colorado River water in the Lower Basin States and for transferring entitlements.

415.9 Exchange or temporary sale of water.

415.10 Reductions in entitlement due to nonuse.

Subpart C—General Management Regulations

415.11 Delivery of unused apportionment and surplus water.

415.12 Water delivery and measurement.

415.13 Water operations and accounting.

415.14 Water quality.

415.15 Wheeling non-system water.

415.16 Changes in service areas.

415.17 Water conservation.

415.18 Environmental compliance.

415.19 Administrative and other fees.

415.20 Penalties.

415.21 Records and reports.

415.22 Procedures for final determinations of nonuse, nonbeneficial use, non-reporting of use, and unauthorized use of Colorado River water and appeals therefrom.

Subpart A—General Provisions

§ 415.1 *Purpose.*

The Boulder Canyon Project Act and the 1964 Supreme Court Decree in *Arizona* v. *California* provide the Secretary of the Interior (Secretary) with the authority and responsibility to manage the mainstream of the Colorado River and to administer entitlements to the use of water therefrom within the Lower Colorado River Basin. These regulations establish criteria, consistent with applicable Federal law, which the Secretary will follow in administering entitlements to, and water users will comply with in utilizing, water from the mainstream of the Colorado River water within the Lower Colorado River Basin. These regulations will apply to the administration of all entitlements to Colorado River water, regardless of how such entitlements were or are obtained. Except for Indian holders of Federal Establishments' Present Perfected Rights (herein defined), entitlements to Colorado River water are available to the water users only under contract with the Secretary.

5.

DRAFT REGULATION§ 6

(BENEFICIAL USE OF ENTITLEMENTS)

§ 415.6 *Beneficial Use of Entitlements.*

(a) *Purpose.* The regulations in this section are intended to address beneficial use and nonuse of entitlements to Colorado River water in the Lower Colorado River Basin.

(b) *Beneficial use.* The diversion and consumptive use of Colorado River water, except by Federal establishments, must be for beneficial uses only.

(c) *Nonuse of entitlements.* Nonuse, nonbeneficial use, nonreporting of use, and unauthorized use are hereinafter referred to singly or collectively as nonuse.

(1) The Regional Director will consult with the appropriate authorities within the States of California, Arizona, or Nevada in determining whether or not a user of Colorado River water is applying that water to beneficial use within that respective State and pursuant to that State's laws. If a State authority, in accordance with established State law procedures, determines that a user of Colorado River water (other than Federal Establishments' PPR user) has not been applying water to a beneficial use, that determination may be respected by the Regional Director for enforcement purposes.

(2) The Regional Director, independent of State authorities, may also make beneficial use determinations for all Colorado River water users when he deems it appropriate. In determining whether a use is beneficial or nonbeneficial, the Regional Director generally will be guided by the laws of the State where the use occurs. The Regional Director may recognize beneficial uses not recognized under State law.

(3) Upon preliminary determination by the Regional Director or (except for a Federal establishment) the appropriate State authority that nonuse has occurred, a Colorado River water user may be subject to a reduction or elimination of entitlement as provided in § 415.10.

6.

DRAFT REGULATION § 10

(REDUCTION IN ENTITLEMENTS DUE TO NONUSE)

§ 415.10 *Reductions in entitlement due to nonuse.*

(a) *Nonuse evaluation factors.* In making a determination of nonuse, the Regional Director, in consultation with appropriate State agencies, will consider relevant facts, circumstances, and conditions that may be unique to each State, consistent with the following guidelines:

(1) The Regional Director shall consider the unique aspects of domestic and agricultural uses of water and allow consideration of future growth in water demands for domestic users;

(2) The Regional Director will ensure that entitlements are not reduced as a result of nonuse brought about by implementation of documented water conservation measures;

(3) If the water user is able to show evidence to the satisfaction of the Regional Director that there will be a need for the entire entitlement within a reasonable time, the Regional Director will consider additional build-up of water use schedules as a basis for retailing entitlement to sufficient Colorado River water for the user's growth for a period of years, based upon an average historical growth rate for a like number of years, adjusted for reasonable conservation. The Regional Director will consult with appropriate State agencies in determining the number of years allowed for a build-up schedule and the number of historical years upon which to base such projections. The Regional Director, in consultation with appropriate State agencies, will review this projection every 5 years and make a new determination of need;

(4) The greatest quantity of Colorado River water entitlement put to reasonable beneficial use, as reported

by the water user over the previous 5 years, adjusted by the Regional Director if necessary for metering errors or other reasons, shall be considered to be the base use of the entitlement for that period;

(5) The Regional Director may consider any Federal or State statutory authority for the allowance of nonuse;

(6) For municipal contract users, the Regional Director may take into account factors including, but not limited to, current population, growth rate, market and economic fluctuations, current water use per capita and projected use per capita, current industrial use, documented and anticipated future needs, other uses of water, the amount and sources of other water, and any other factors deemed to be relevant to the municipality's actual need for the Colorado River water; and

(7) For agricultural contract users, the Regional Director may take into account factors including, but not limited to, irrigable acres and acres irrigated, cropping patterns, return flow rates, diversions, evapotranspiration rates, irrigation efficiency, and type and condition of irrigation systems utilized.

(b) *Determination of nonuse and reduction of entitlement.* Upon a preliminary determination by the Regional Director that a 5-year period of nonuse has occurred, the procedures set forth in § 415.22 shall be followed. Upon a final determination of nonuse by the Regional Director (which determination shall take into account, if applicable, the hearing examiner's recommended findings of fact and conclusions of law), the Regional Director shall issue to the user, as appropriate, a cease and desist order or an order reducing the user's entitlement. Any such order issued pursuant to § 415.22 will specify the amount of the reduction. If the user disagrees with the Regional Director's determination of nonuse or the amount of the reduction, the user may appeal the decision to the Commissioner pursuant to § 415.22(f). If the Regional Director's deter-

mination of nonuse is not rescinded as a result of a successful appeal pursuant to § 415.22 the Regional Director will provide a contract amendment to the user for execution which shall reflect the reduced entitlement. If the user refuses to properly execute the contract amendment, the Regional Director may administratively reduce the user's contract entitlement and the user thereafter will be entitled to divert no more water than is allowed under the reduced entitlement.

(c) *Disposition of recaptured entitlement.* An entitlement to Colorado River water made available as a result of a reduction because of a finding of nonuse will be made available to other water user(s) within the appropriate State, as determined by the Secretary.

(d) *Five-year review of water utilization.* The water use of each water user may be reviewed by the Regional Director at 5-year intervals to verify that water is being used in accordance with terms of the contract. Use not in accordance with the terms of the contract or these regulations may result in an adjustment of the water user's Colorado River water entitlement.

7.

DRAFT REGULATION § 17

(WATER CONSERVATION)

§ 415.17 *Water conservation.*

(a) *Reasonable conservation required.* The Reclamation Reform Act of 1982, section 210(b), requires that

> Each district that has entered into a repayment contract or water service contract pursuant to Federal reclamation law or the Water Supply Act of 1958, as amended (43 U.S.C. 390b), shall develop a water conservation plan which shall contain definite goals, appropriate water conservation measures, and a time schedule for meeting the water conservation objectives.

(b) *Consultation with contractors.* 43 CFR Part 417, entitled "Procedural Methods for Implementing Colorado River Water Conservation Measures with Lower Basin Contractors and Others," authorizes the Regional Director to

> conduct such consultations with each Contractor as the Regional Director may deem appropriate as to the making by the Regional Director of annual recommendations relating to water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, and to the making by the Regional Director of annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each contractor will not exceed those reasonably required for beneficial use.

(c) *Prevention of waste.* As governed by the principle of beneficial use, the works, systems, methods, and operating procedures employed by water users in the diversion, distribution, delivery, and use of Colorado River water in the Lower Basin shall be reasonably designed and maintained

to prevent waste, unreasonable use, or unreasonable methods of diversion of such waters.

(d) *Water conservation plans.* Water conservation plans shall be required of all water users for use of Colorado River water. Each plan shall contain reasonable and economically feasible goals, measures, and time schedules as required by section 210(b) of the Reclamation Reform Act.

(1) Water users that irrigate less than 2,000 acres and domestic users with diversion entitlements of less than 5,000 acre-feet annually may be exempted from the preparation of a water conservation plan but shall be required to submit annual reports as required herein. Agricultural users annually will be required to submit a description of their methods of irrigation and crop reports, and domestic users will be required to provide information on measured or estimated water system losses.

(2) Water users may submit or designate State-required water conservation plans for approval by the Regional Director to satisfy the requirements of these regulations.

(e) *Updating water conservation plans.* Water conservation plans shall be updated by a water user at 5-year intervals and submitted to the Regional Director for review and approval. Water users, including those who have submitted or designated State-regulated water conservation plans, shall update their water conservation plans by submitting addenda that include the following information: an evaluation of accomplishments in water conservation during the previous five years; a discussion of future water needs; water conservation opportunities, limitations, and goals; and time schedules for implementing new or modified water conservation measures.

(f) *Notice of plan deficiency.* If the Regional Director or an appropriate State authority determines that a water user is applying Colorado River water to a nonbeneficial

or unreasonable use, or is making an unreasonable diversion, the Regional Director may direct a water user in writing to modify the water conservation plan to address specific goals, measures, and time schedules for implementing actions to reduce such nonbeneficial or unreasonable use or unreasonable diversion within a reasonable time frame. Upon such determination, the Regional Director shall follow the procedures set forth in 43 CFR Part 417. Such determination is separate from the determination of nonuse under § 415.10(b). The Regional Director may also direct the modification of water conservation plans to meet the requirements of the appropriate State authority.

(g) *Reduction in diversion request.* If a water user fails to take actions required to correct the nonbeneficial or unreasonable use of Colorado River water within the designated time period, the Regional Director may reduce the water user's diversion request, in accordance with the procedures set forth in 43 CFR Part 417, in an amount equal to the amount of water that the Regional Director determines is nonbeneficially or unreasonably used. Any such reduction shall continue to be made until the water user has eliminated the nonbeneficial or unreasonable use. This reduction in diversions is separate from the reduction in entitlement pursuant to § 415.10.

8.

DRAFT REGULATION § 20

(PENALTIES)

§ 415.20 *Penalties.*

(a) *Reduction of entitlement.* Entitlements may be reduced by the amount that the Regional Director or the appropriate State authority, with the concurrence of the Regional Director, determines to be nonuse in accordance with the nonuse evaluation factors set forth in § 415.10(a).

(b) *Enforcement costs for preventing nonuse.* If a user refuses to reduce its diversion of water when so directed by the Regional Director in accordance with the provisions of § 415.10, that user may be subject to paying all reasonable costs, as determined by the Regional Director, incurred by the United States after the issuance of said order to enforce the reduction in the user's entitlement.

(c) *Enforcement costs for preventing use by an unauthorized user.* When a user is determined to be an unauthorized user, all reasonable costs incurred thereafter by the United States associated with stopping the unauthorized use and preventing such unauthorized use from reoccurring in the future, as determined by the Regional Director, shall be assessed to the unauthorized user.

(d) *Late payment.* Bills not paid in full by a water user by the due date shall be subject to interest, penalties, and administrative costs on delinquent payments pursuant to section 11 of the Debt Collection Act of 1982 (Public Law 97-365). The interest rate shall be the greater of (1) the rate prescribed quarterly in the *Federal Register* by the Department of the Treasury for application to overdue payments, or (2) the interest rate of 0.5 percent per month prescribed by section 6 of the Reclamation Project Act of 1939 (Public Law 76-260).

(e) *Adjustment for overruns.* If a user consistently overruns its entitlement and does not make a good faith effort to reduce diversions to compensate for said overruns, as determined by the Regional Director, Reclamation may, after providing written notification to the user, review and

modify the user's weekly orders until the user's diversions have been sufficiently reduced to adjust for the accumulated overruns.